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Supreme Court, U.S.

FILED

AUG 30 1989

JOSEPH P. SPANIOLO, JR.
CLERK

NO.

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SUPREME COURT OF THE UNITED STATES

=====

OCTOBER TERM 1989

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ADELINA CICIRELLO,
Petitioner,

v.

NEW YORK TELEPHONE COMPANY,
Respondent.

=====

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

=====

PETITION FOR WRIT OF CERTIORARI

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598



QUESTION PRESENTED

Does a beneficiary of the provisions of a consent decree in an action brought under the provisions of the Civil Rights Act of 1964, 42 USC Sections 2000e-1 et seq., and the Fair Labor Standards Act of 1938, 28 USC Section 201 et seq. have standing to sue under the consent decree for the benefits due her under the consent decree?



PARTIES

The parties before this court are petitioner Adelina Cicirello and respondent New York Telephone Company.

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for the Eastern District
of Pennsylvania

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PETITION

Petitioner, Adelina F.

Cicirello, respectfully prays that a writ of certiorari be issued to review the order of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 8, 1989 which affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania granting summary judgment and dismissing the petitioner's claim.



OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit dated June 8, 1989 has been made the first entry of the appendix which is being submitted together with this petition.

The memorandum and order of the United States District Court for the Eastern District of Pennsylvania dated January 4, 1989 has been made the second entry of the appendix which is being submitted together with this petition.



JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on June 8, 1989. This petition has been filed within ninety days of the entry of Judgment Order of the Court of Appeals.

The basis for the Supreme Court's jurisdiction over this matter is 28 USC Section 1254(1).



STATUTORY PROVISIONS INVOLVED

The civil action which has resulted in this petition was not founded upon any statute but upon the inherent equitable powers of the district court to enforce orders entered in that court.



STATEMENT OF THE CASE

Petitioner brought a civil action in the United States District Court for the Eastern District of Pennsylvania seeking the benefits due her under a consent decree which had been entered in another action in the same district court.

The action in which the consent decree was entered was Brennan v. American Telephone and Telegraph Co., Civil Action No. 74-1342. In the Brennan case, the Secretary of Labor, the Equal Employment Opportunity Commission and the United States brought an action against the



American Telephone and Telegraph Co. as well as against its constituent local companies under Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act. The gravamen of the Brennan action was that the defendants in that action had discriminated against women in hiring, promotion, and job assignments. The action sought such relief as would redress that discrimination.

On May 30, 1974, a consent decree was entered in the Brennan matter. The relief ordered pursuant to the consent decree was that

defendants would upgrade the salaries of women in certain job classifications, make payments of back pay to those individuals, inform the affected individuals of the programs under the consent decree, and institute non-discriminatory promotion policies.

The petitioner was employed by New York Telephone, a defendant in the Brennan case and the respondent in this matter. She was one of the individuals covered under the provisions of the consent decree. Nonetheless, respondent New York Telephone did not pay petitioner back



pay, did not upgrade her salary, and did not inform her of any program being instituted under the consent decree, all in violation of the decree. Furthermore, the respondent, in violation of the consent decree, fraudulently concealed the existence of the decree from the petitioner and downgraded her position so as to prevent petitioner from obtaining the benefits of the decree.

Petitioner sued in order to seek redress for the violation of the consent decree as it applied to her. She sued in the court in which the consent decree had been entered



pursuant to the inherent equitable power of the court to enforce an order entered by it.

Respondent moved to dismiss the complaint in the district court. The court allowed plaintiff leave to file an amended complaint. Respondent moved for summary judgment with respect to the amended complaint. That motion was granted and the amended complaint dismissed in its entirety, solely upon the grounds that petitioner lacked standing to sue.



Petitioner appealed that final disposition of the matter to the United States Court of Appeals for the Third Circuit pursuant to 28 USC Section 1291. The Third Circuit affirmed the judgment of the district court "essentially for the reasons set forth" by the district court.

Petitioner now seeks a writ of certiorari to the Third Circuit for the purpose of reviewing its affirmation of the district court's order.



REASONS FOR GRANTING THE WRIT

Petitioner sets forth three reasons why the writ applied for should be granted:

1. The Supreme Court has never decided whether a beneficiary of a consent decree entered in a civil rights matter has standing to sue for the enforcement of the decree. It would benefit the bench, the bar, and public for the Supreme Court to speak to this issue.

2. Several circuits of the United States Courts of Appeals have held that beneficiaries of consent decrees do have standing to sue.



3. The judgment of the United States Court of Appeals for the Third Circuit was made without the benefit of the recent opinion of the Supreme Court in Martin v. Wilks, Nos. 87-1614, 87-1639, and 87-1668, 57 US Law Week 4616 (June 12, 1989,) which suggests that non-parties affected by consent decree have standing to seek relief with respect to matters concerning such consent decrees.

A third-party beneficiary to the provisions of a consent decree entered in a civil rights matter ought to have standing to sue to

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enforce the provisions of the decree. In this case, petitioner was such a third-party beneficiary since she stood to gain from the provisions of the decree.

In Blue Chip Stamps v. Manor Drug Stores, 421 US 723 (1975), the Supreme Court suggested that, in a securities case, third party beneficiaries did not have standing to sue under a consent decree. However, there are important policy reasons for not applying the same rule to civil rights cases. The remedial purpose of the legislation militates in favor of the broadest



possible access to redress by aggrieved parties.

In Perdue v Roy Stone Transfer Corp., 690 F. 2d. 1091, 1093 (4th Cir 1982), employee and employer had entered into a private conciliation agreement under the auspices of the EEOC. That agreement was never honored by the employer. Employee sued under Title VII to redress discrimination. As a result of the lapse of time occasioned by the negotiation and consummation of the conciliation agreement, the employee was prevented from timely obtaining a right to sue letter. The court of



appeals refused to read Title VII, as did the district court, in a manner such that "claimant forever loses his entitlement...to seek redress in the federal court....We will impose such a harsh result only if the the policies embodied in the statute clearly so require."

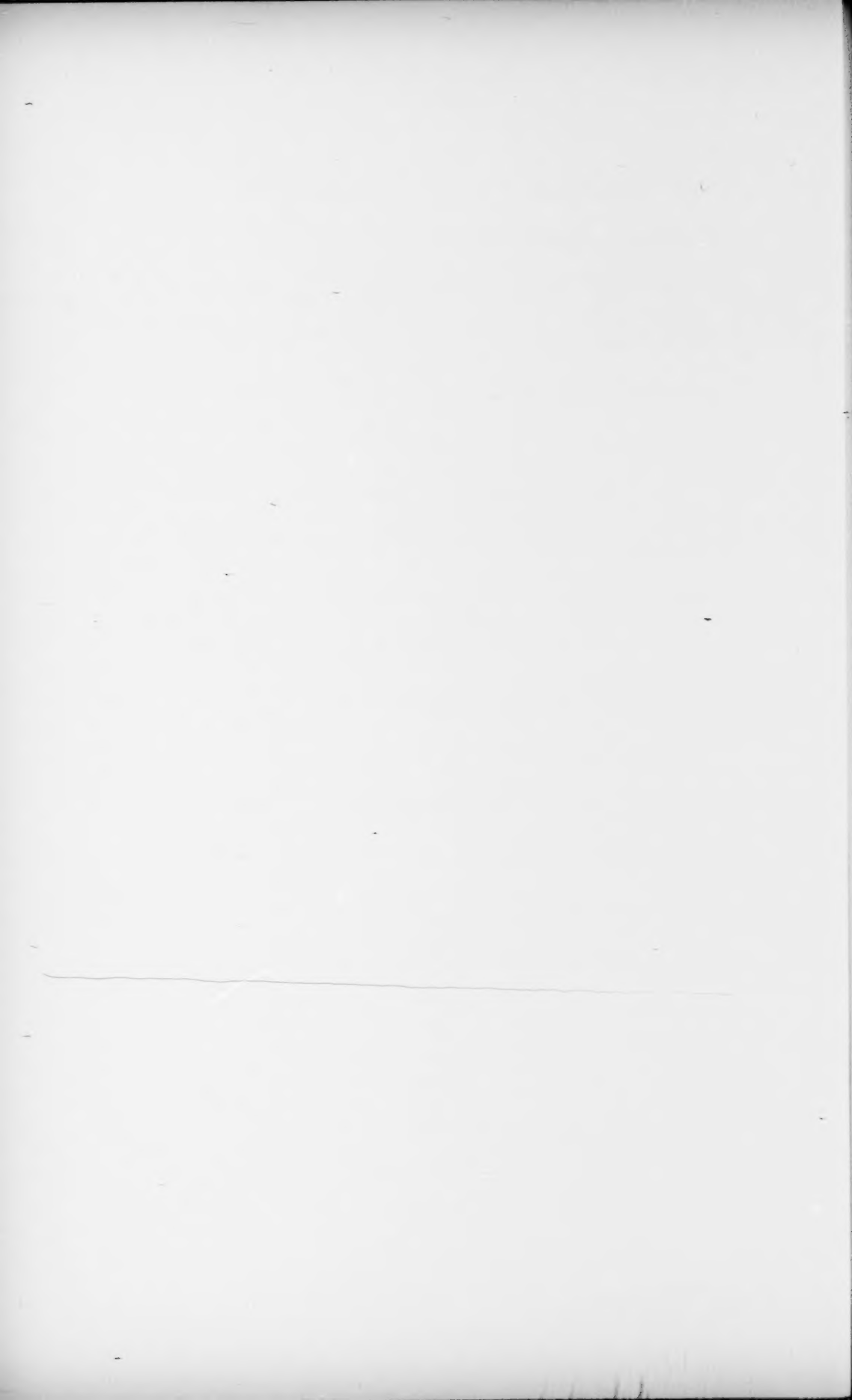
The standing issues involved in the Supreme Court securities and antitrust cases are not similar to the issue involved in this case. In Blue Chip Stamps, supra, the standing issue turned on whether plaintiffs failed to establish standing as buyers or sellers of securities under



the Birnbaum rule, Birnbaum v. Newport Steel Court, 193 F. 2d. 461 (2nd Cir 1952), cert denied 343 US 956, and not on the fact that the plaintiffs derived their purported rights from a consent decree.

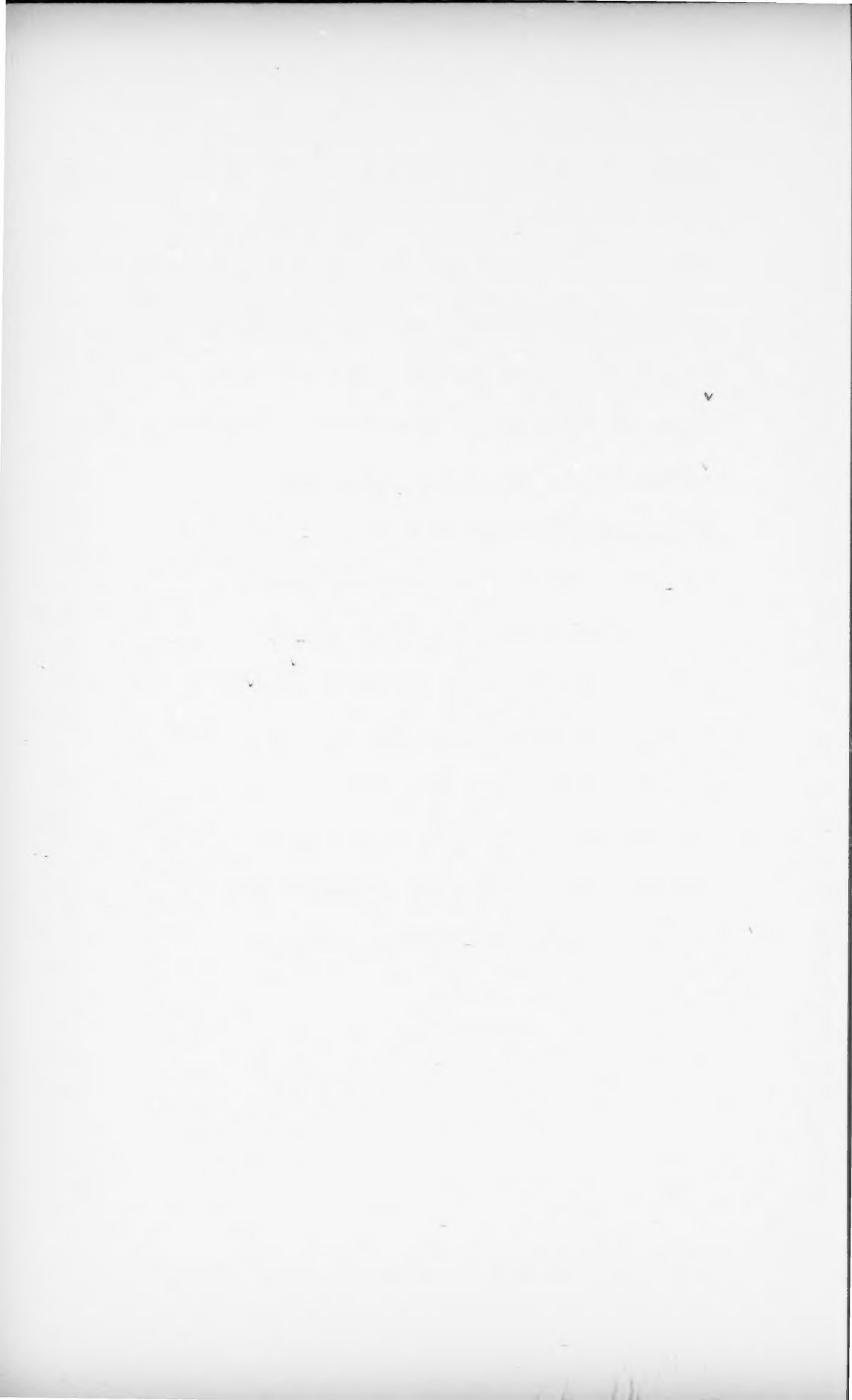
The Seventh Circuit and the Federal Circuit have each held that beneficiaries of as consent decree have standing to sue for the benefits due them under the decree.

The Seventh Circuit, in a civil rights case, has recognized that "a consent decree is a form of contract and, as such, the rules of contract interpretation are applicable."



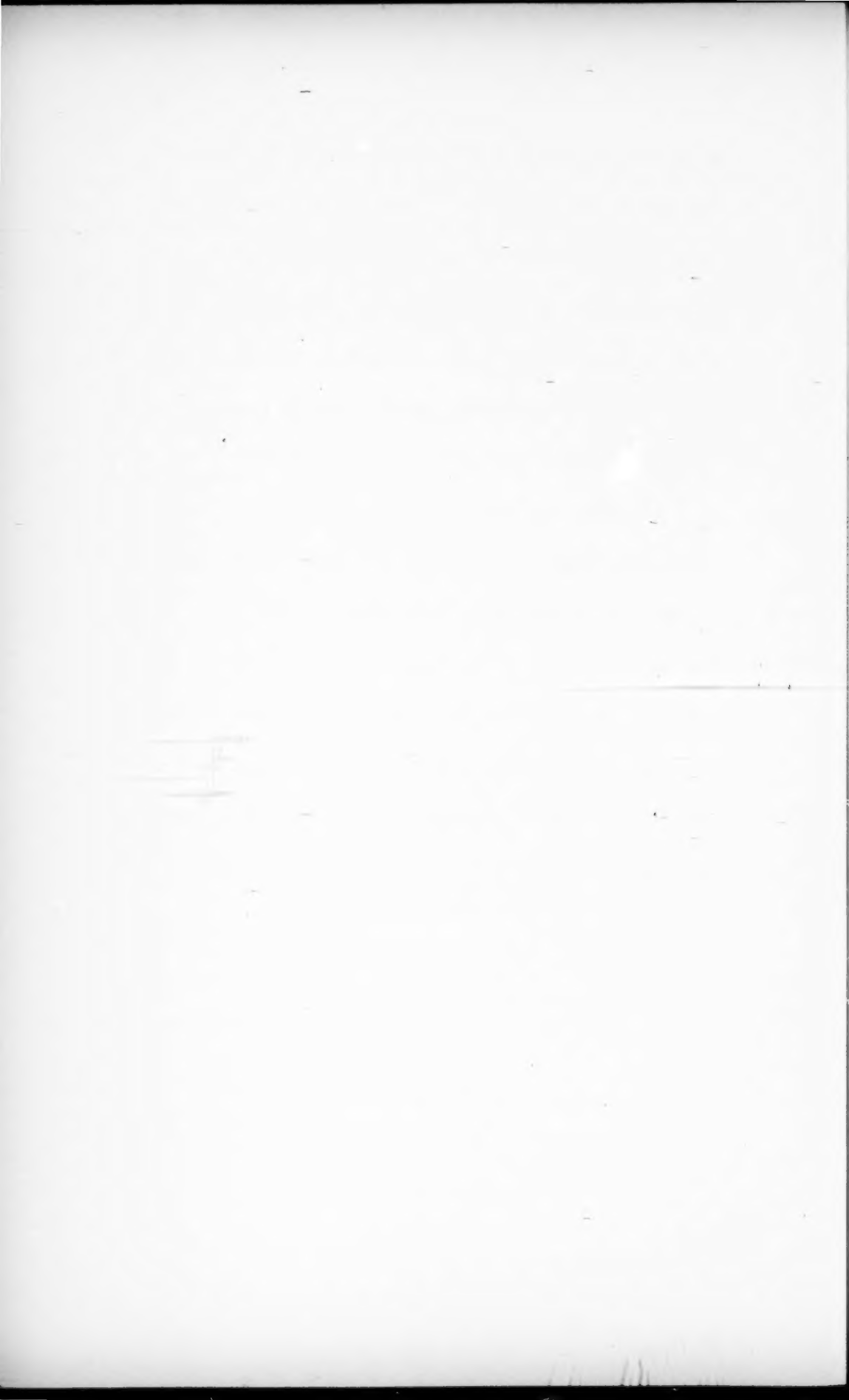
South v. Rowe, 759 F. 2d. 610, 613 (7th Circuit 1985). The court went on to hold that an intended third-party beneficiary had standing to sue to enforce the provisions of the consent decree in question. Accord, Jones v. Local 520, International Union of Operating Engineers, 603 F. 2d. 664, 666 (7th Circuit 1979).

The Federal Circuit has similarly held in another context. In H.F. Allen Orchards v. U.S., 749 F. 2d. 1571 (Fed Cir 1984), cert denied 106 S Ct 64, a group of farmers brought suit against the United States directly under a



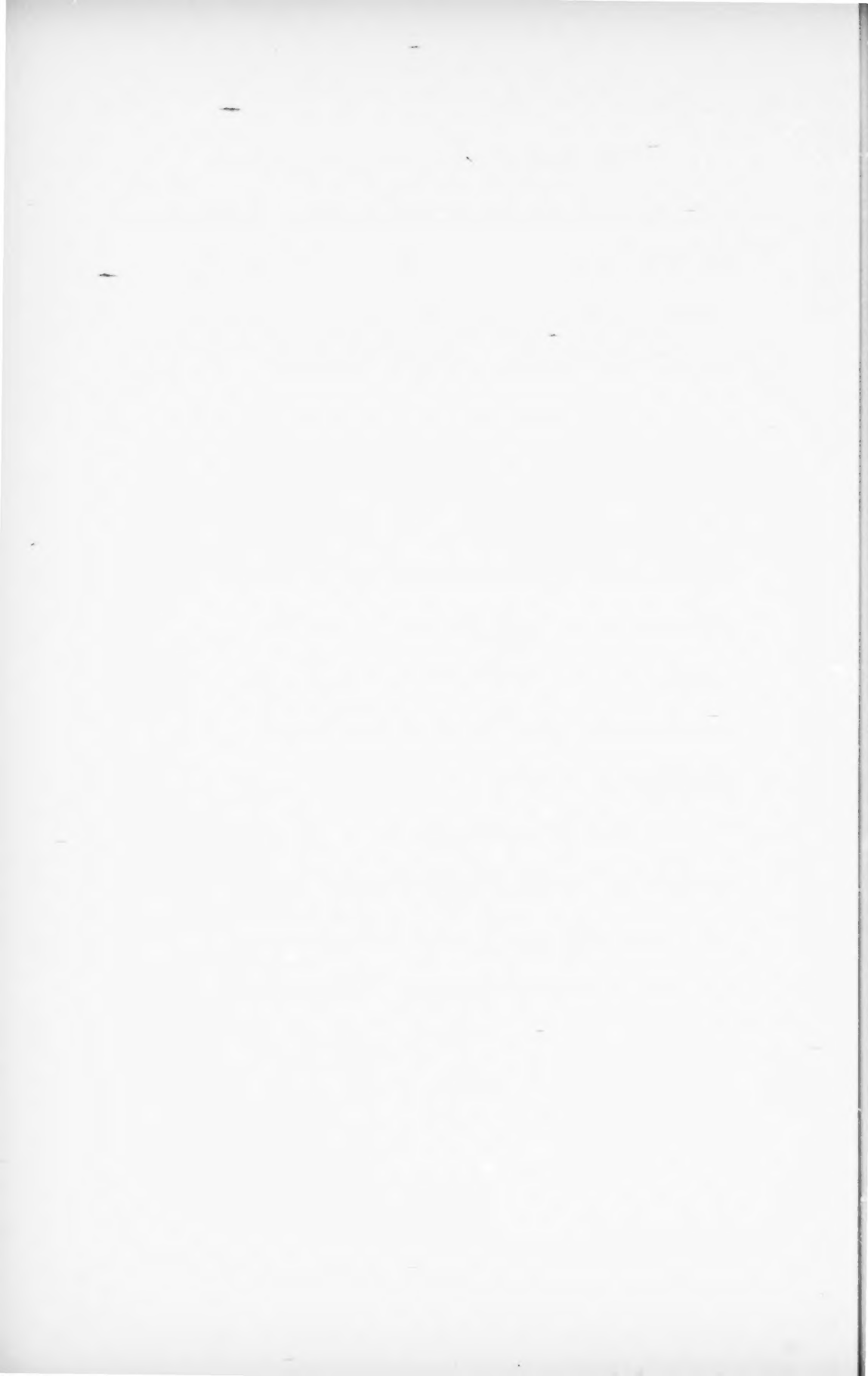
consent order which had been entered in another matter. The litigants in the first matter were the United States and an irrigation district. The subject of the consent decree was the allocation of water to farmers within that irrigation district.

The court opined that the farmers had standing to sue directly under the consent decree. The farmers were the consumers of the water which was being allocated and hence were real parties in interest as third-party beneficiaries of the consent decree.



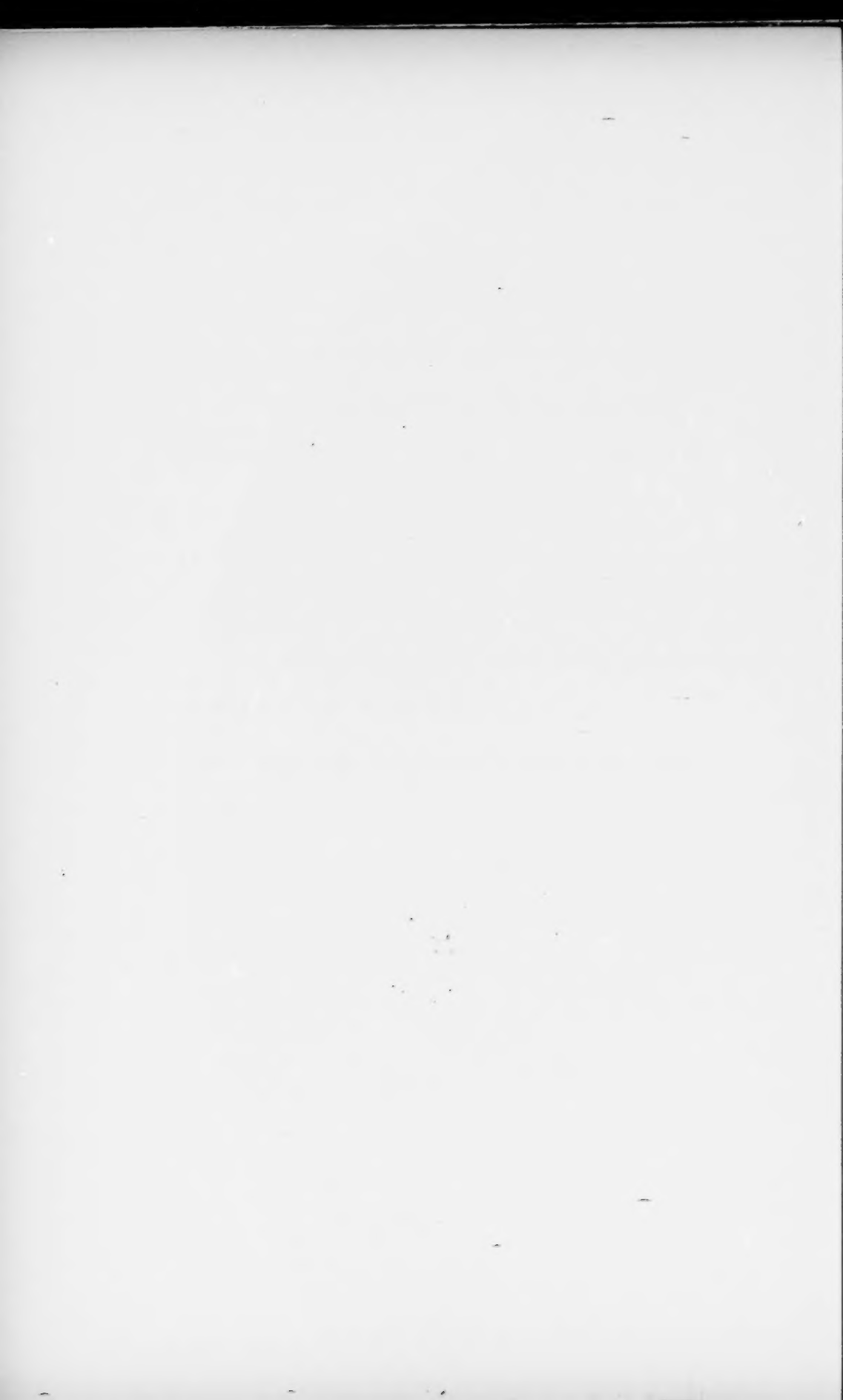
The district court's opinion in the matter at bar--which was adopted by the court of appeals--was based in large part on its perception that, under the terms of the consent decree, it was the government's sole province to enforce the decree. A careful reading of the decree certainly contemplates government enforcement but it by no means compels the conclusion that the government plaintiffs had that exclusive right.

The provisions upon which the district court relied were Section II, subsection A and Section I.B.I.B. of the consent decree. The first of



those clauses states that the government "may seek an appropriate resolution of the question by the Court[,]" where there are unresolved problems with non-compliance with the decree. The second clause states that any separate relief obtained by an aggrieved party will disqualify that individual from obtaining relief under the consent decree.

Neither of these provisions should have convinced the courts below that that the drafters of the consent decree contemplated that the government should enforce the decree exclusively. The petitioner in this



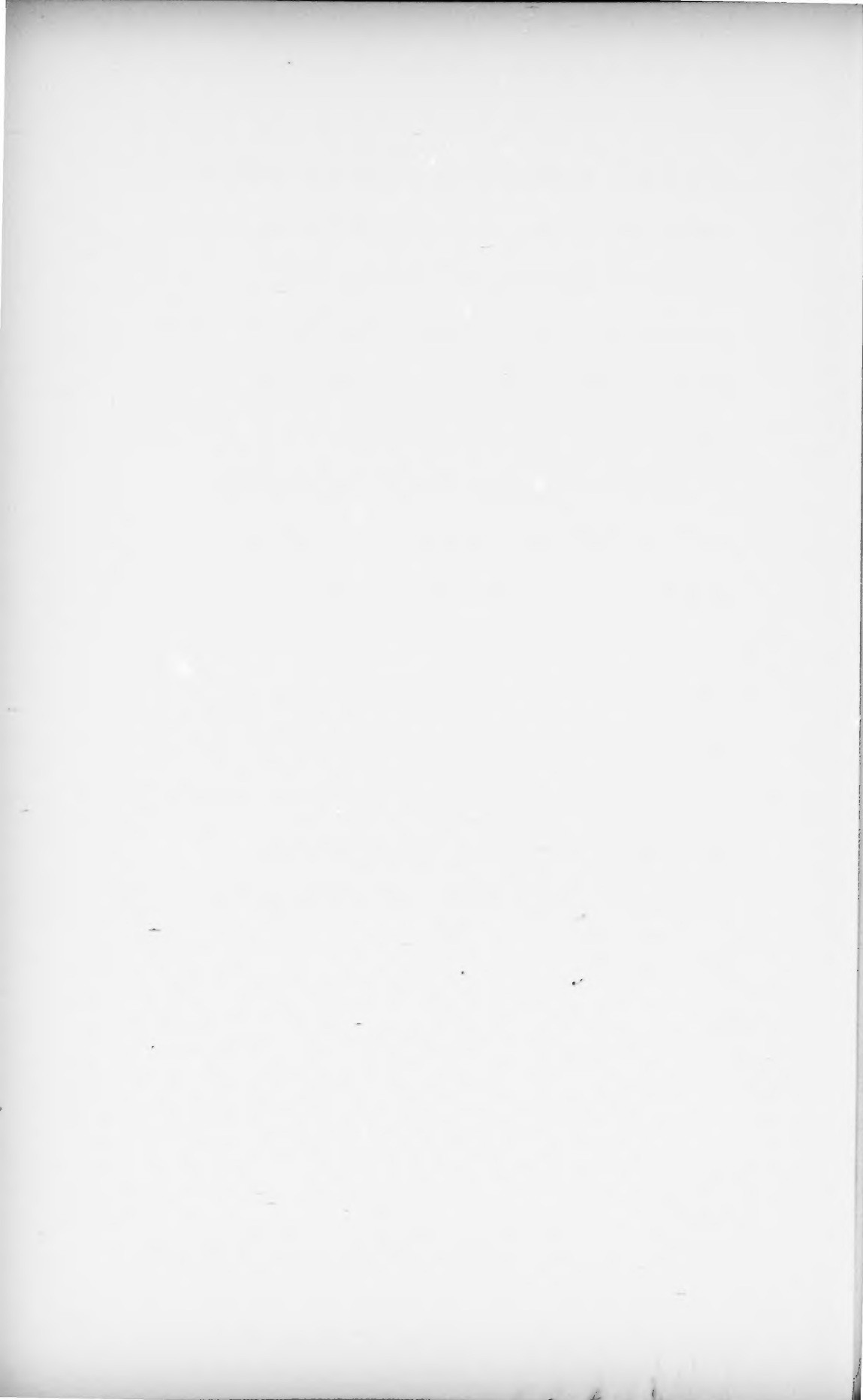
case should not lack the opportunity to enforce the provisions of a court order which directly involved her civil rights.

That petitioner should have her day in court is also suggested by the recent Supreme Court opinion in Martin v. Wilks, supra. In that case, white firefighters sued for redress of race discrimination in hiring and promotion in the Birmingham fire department. The defendants in that case contended that the plaintiffs' actions were foreclosed by consent decrees which



had been entered in previous actions, which mandated racial preferences in favor of blacks in hiring and promotion within the department. The white firefighters had not been parties to the original suit.

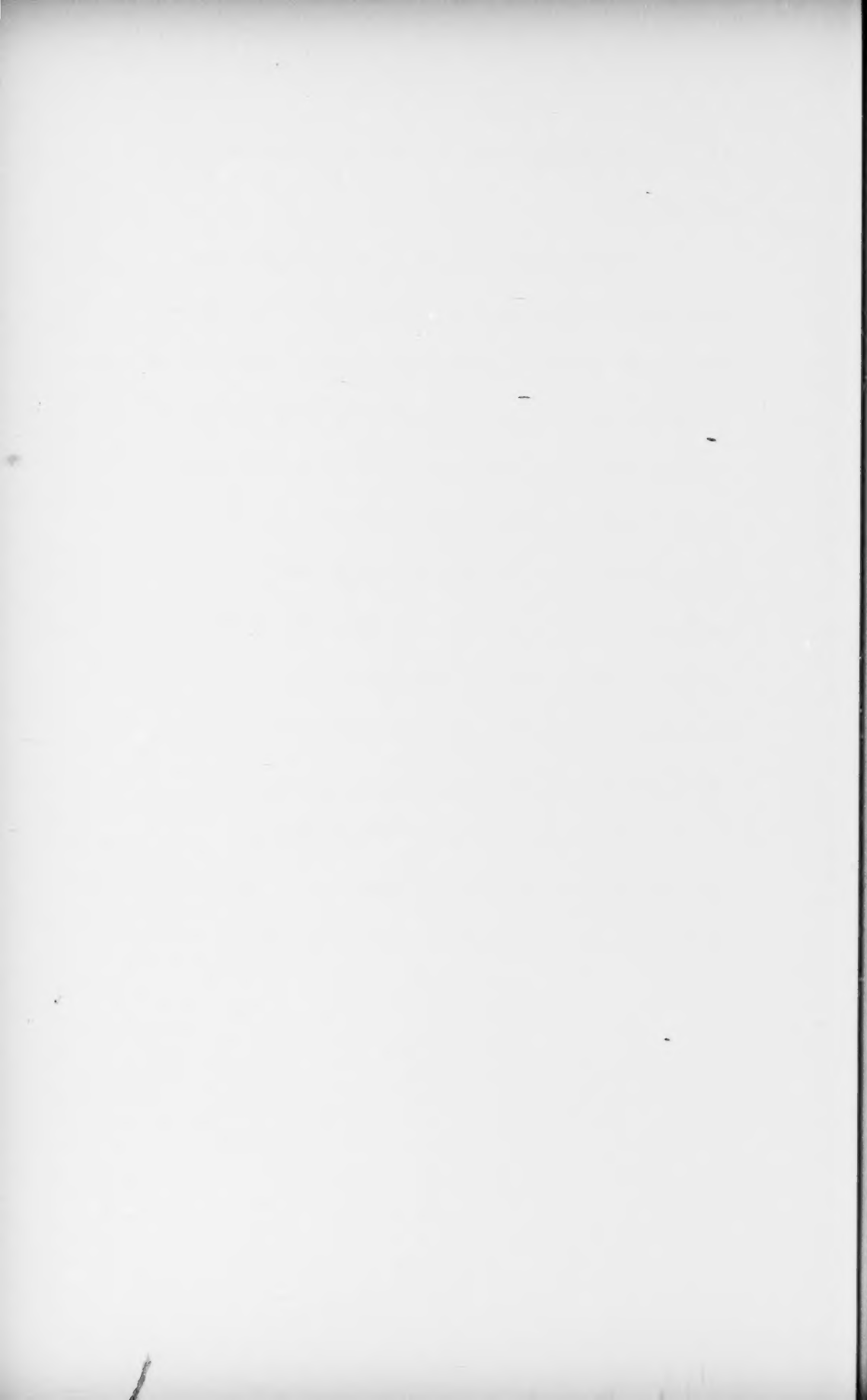
The Supreme Court held that such a "holding contravenes the general rule that a person cannot be deprived of his legal right in a proceeding to which he is not a party...A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to



those proceedings." 57 US Law Week
at 4617.

Petitioner was a stranger to the proceedings in which the original consent decree was entered. Yet, the courts below held that by the very terms of the decree, petitioner was deprived of the opportunity to gain the benefits to which she was entitled by virtue of having been a past victim of discrimination. Such a result would contravene the policy articulated in Martin v. Wilk.


Such a result would also violate the basic policies underlying Title VII. Other circuits would have



allowed petitioner the standing to sue. The precedents of this court do not militate an opposite result.

This Supreme Court should consider reviewing this case in order to articulate the proper rule of law in this case of first impression.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Peter A. Buxbaum", written in dark ink.

PETER A. BUXBAUM
Attorney for Petitioner



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1100

CICIRELLO, ADELINA
Appellant

v.

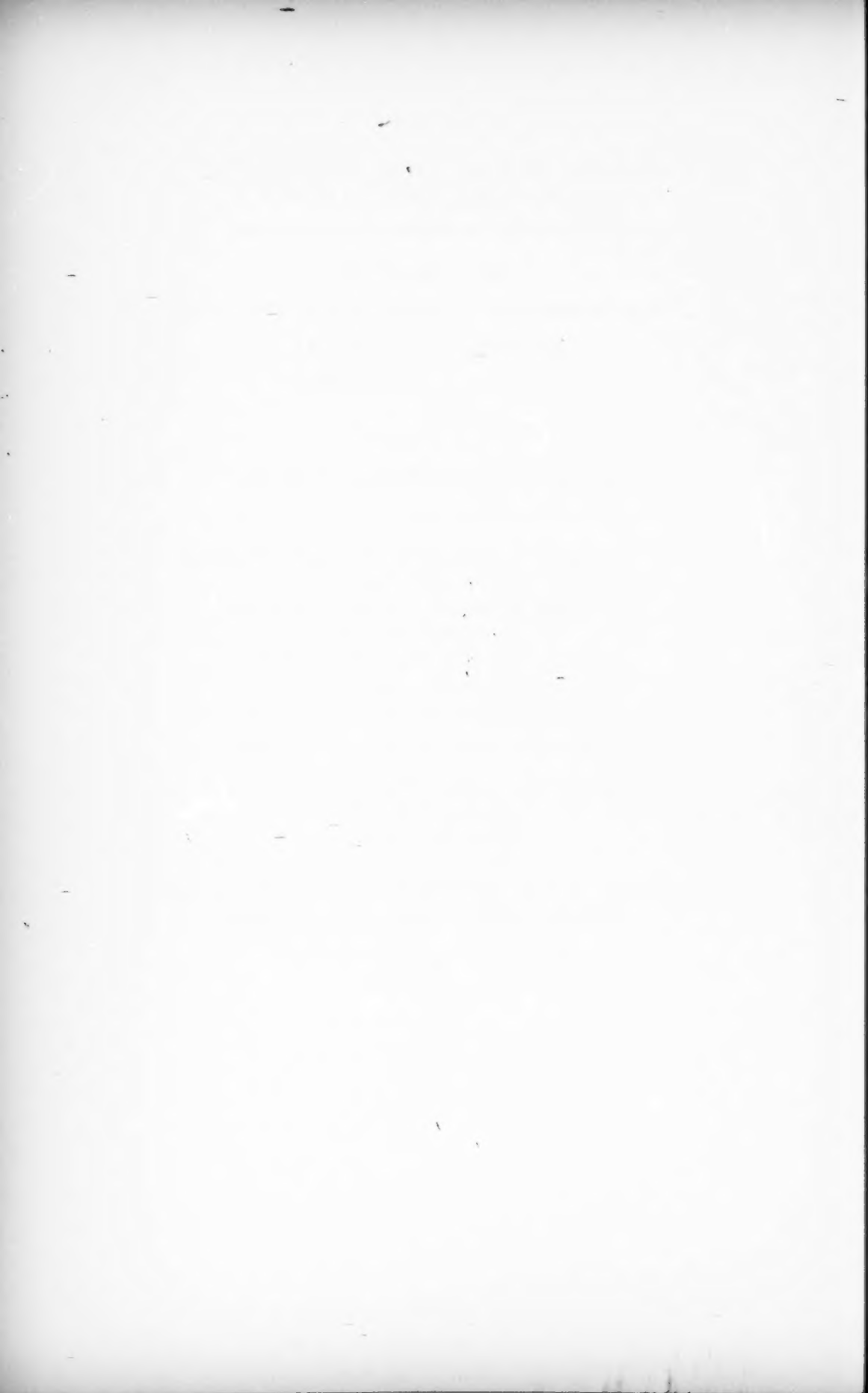
NEW YORK TELEPHONE COMPANY

On Appeal from the United States
District Court
for the Eastern District of
Pennsylvania
(D.C. Civil No. 86-3366)
District Judge:
Honorable Louis H. Pollak

Submitted under Third Circuit
Rule 12 (6)
May 30, 1989

BEFORE: HIGGINBOTHAM, GREENBERG, AND
HUTCHINSON, Circuit Judges

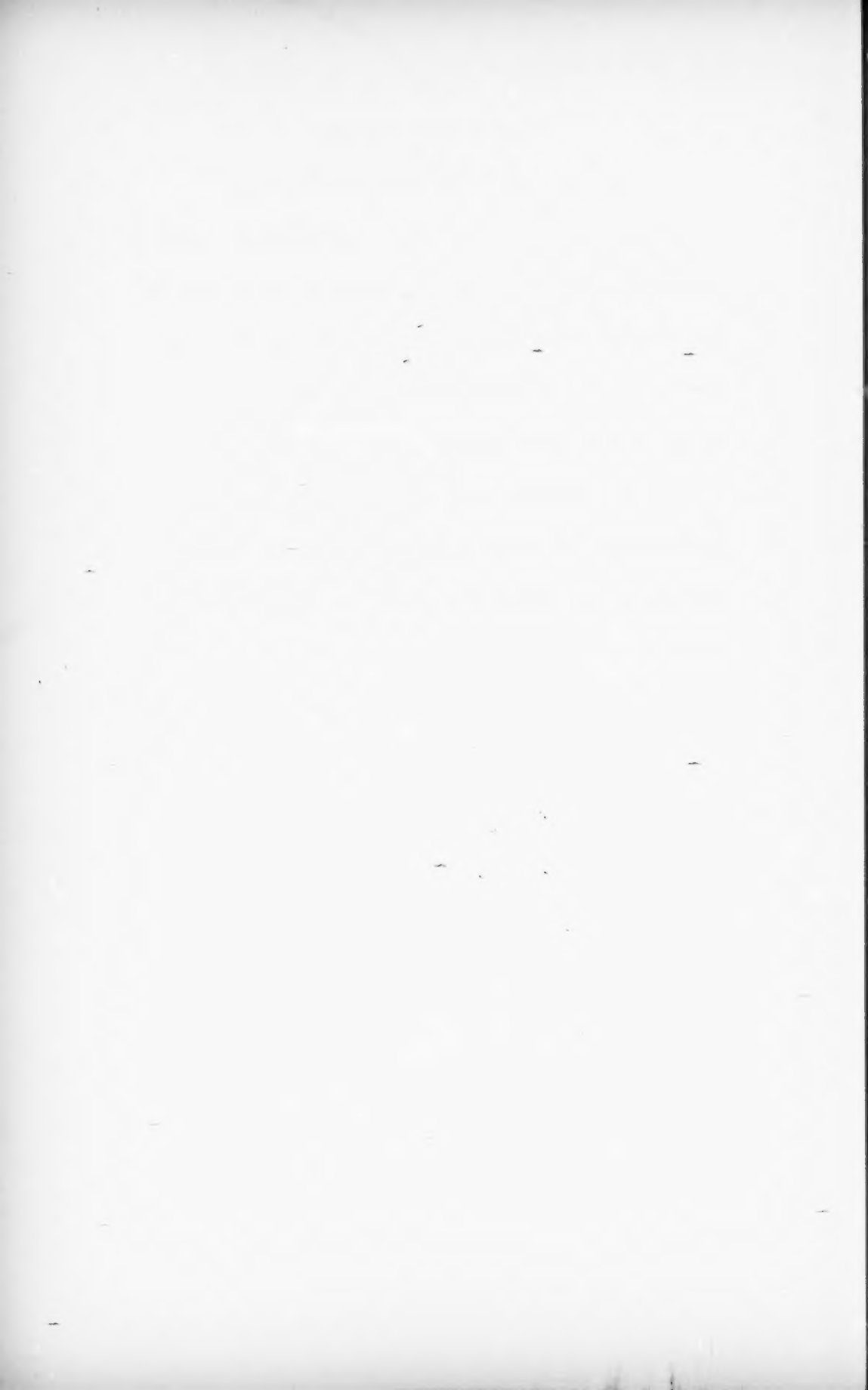
A-1



JUDGMENT ORDER

After consideration of all
contentions raised by appellant, and
essentially for the reasons set forth
by Judge Pollak in his memorandum of
January 4, 1989 reprinted starting at
page 3 of the appendix, it is

ADJUDGED and ORDERED that the
judgment of the district court of
January 4, 1989 be and is hereby
affirmed.



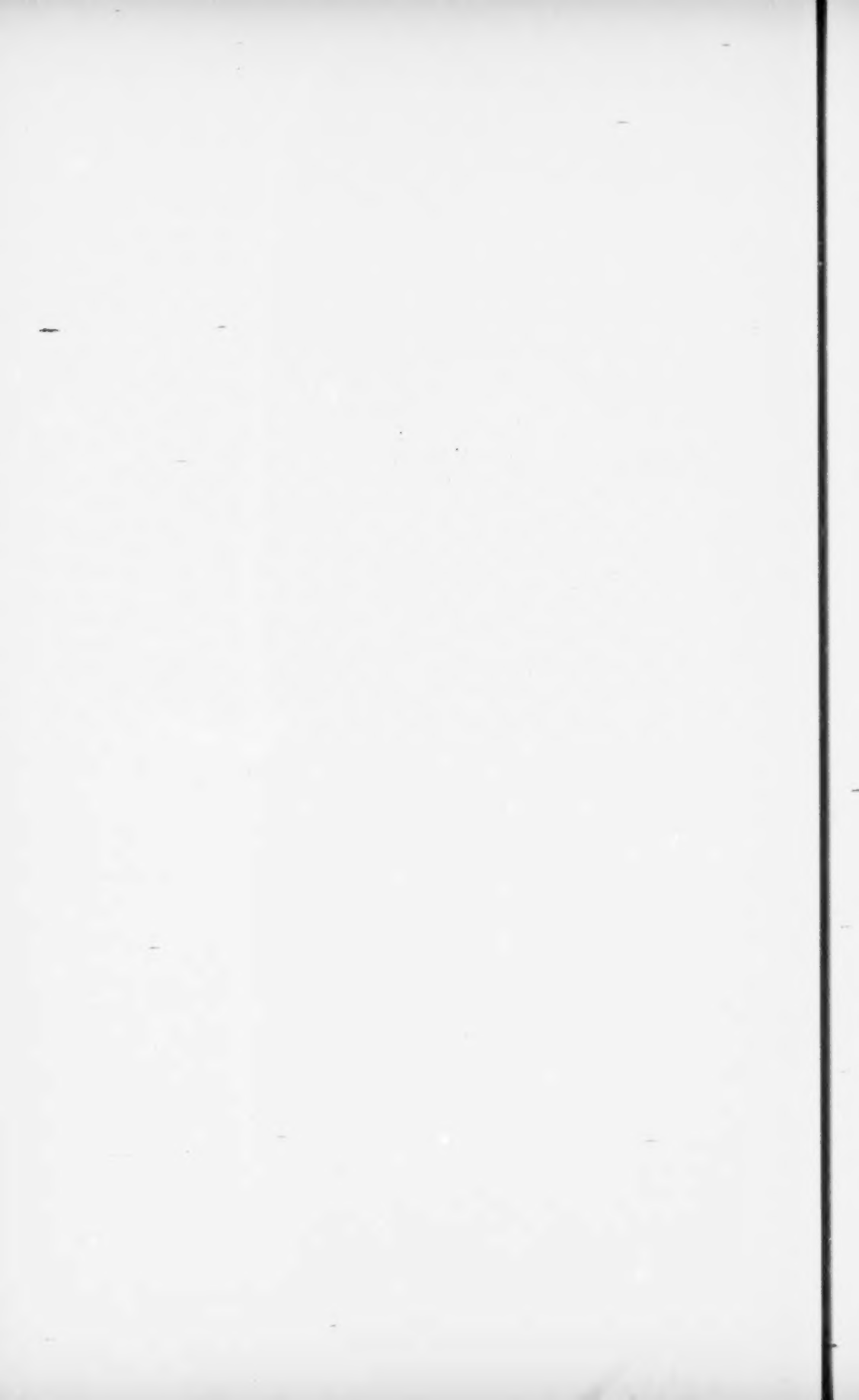
Costs taxed against appellant.

BY THE COURT,

Circuit Judge

ATTEST:

Sally Mrvos, Clerk



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

ADELINA CICIRELLO: CIVIL NO.

v.

NEW YORK

TELEPHONE CO.

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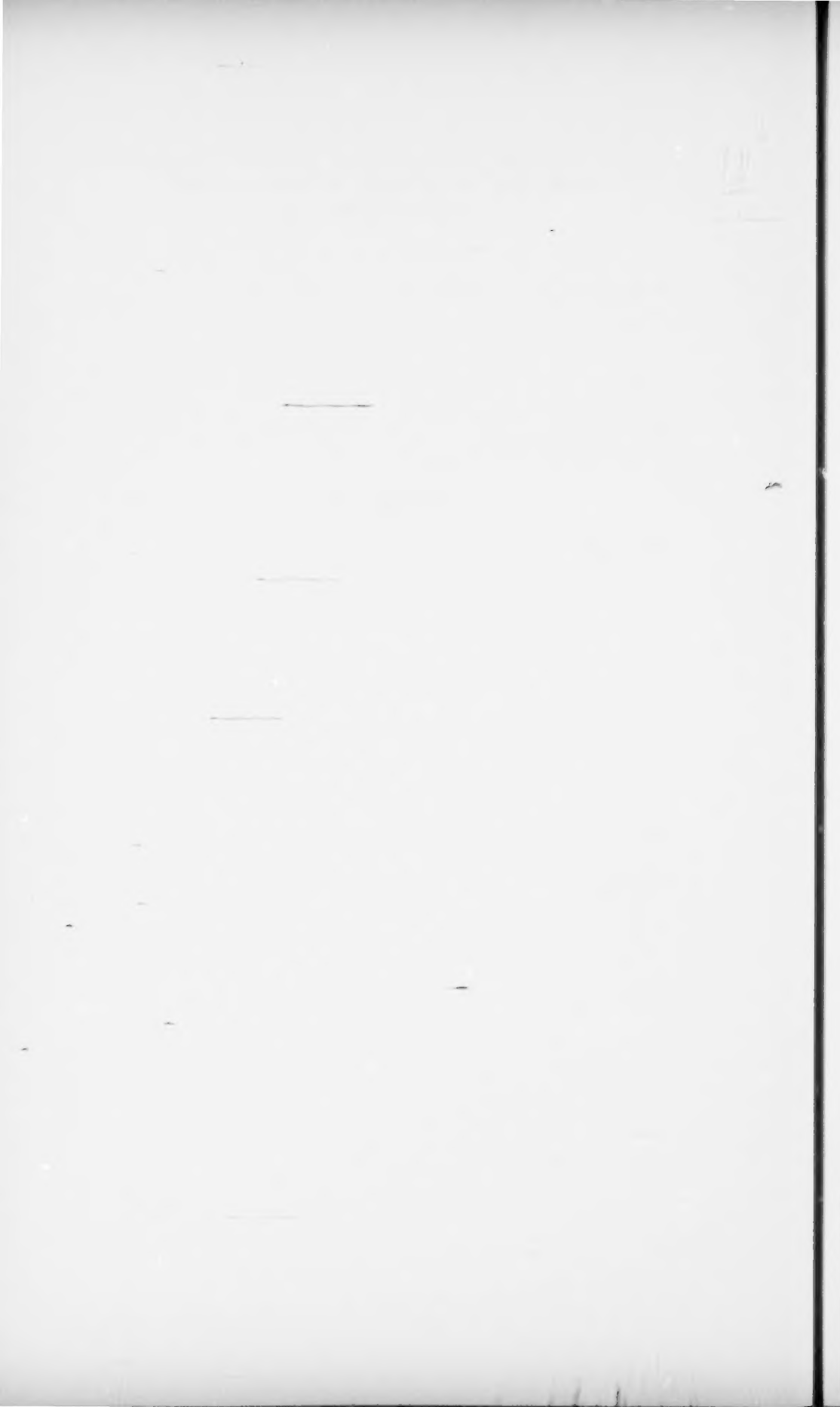
86-3366

MEMORANDUM

POLLACK, J.

January 4, 1989

Plaintiff brings the present
action for reinstatement and back
pay to redress an alleged violation
of a 1974 consent decree (the
"Decree") that resolved a class sex



discrimination in a case entitled in Brennan v. American Telephone and Telegraph Co., Civ. NO. 74-1342 (E.D. Pa. May 30, 1974). Plaintiffs in Brennan were Secretary of Labor Peter Brennan, the Equal Employment Opportunity Commission, and the United States of America; defendants included numerous constituents of AT&T, including New York Company, the named defendant in the present action.\1 The Decree included

1. The action in 74-1342 was brought pursuant to sections 706 (f) (1) and 707 (e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section



directives for evaluation of jobs and assignment of minimum salary levels and back pay awards to specific employees.

Defendant has moved to dismiss plaintiff's action for inter alia, lack of standing, lack of jurisdiction, \2 laches, as failing to

[Footnote 1 continued]
2000e et seq, and sections 6(d), 15 (a) (2), and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. section 201 et seq.

2. Defendant further claims that the jurisdiction of this court to enforce the Decree has expired. Section III.A. of the Decree provides in pertinent part:

[Footnote 2 continued]

The Court retains jurisdiction of this action for entry of such orders as are necessary to effectuate the provisions of this Decree. The term of this Decree shall be five years from this date, but as to the specific issues dealt with herein, the Defendants are permanently enjoined from violating the provisions of the Equal Pay Act, Title VII, and the Executive Order. Upon certification to this Court that the payment of back wages ordered in Part A, Section II, has been made, that portion of this Decree will be dissolved as having been satisfied.

By these terms, the five-year period would have expired on May 30, 1979.

As noted in the September 2, 1987 oral argument on defendant's previous motion to dismiss, this court currently retains subject matter jurisdiction over plaintiff's claims despite expiration of the Decree insofar as plaintiff has pled



state a claim under the Decree, and preclusion by the final judgment entered in the action of Cicirello v. New York Telephone Co., Civ. No. 83 Div. 3114 (S.D.N.Y. Oct 10, 1984), aff'd, No. 84-7935 (2d Cir. March 5, 1985). After oral argument, I allowed discovery on the question of laches and delayed disposition of the motion pending receipt of further briefing on both the claim of laches and on the threshold question of plaintiff's standing. Defendant's motion to

[Footnote 2 continued]
that defendant's fraudulent conduct prevented timely exercise of her rights.

dismiss plaintiff's amended complaint\3 is now ripe for disposition.

Plaintiff claims that she has standing to bring this action to enforce its provisions because she was employed by the defendant during the period in which the Decree was in effect. Specifically, plaintiff pleads that she was "one of the individuals who was covered by the Decree as having been discriminated against in job assignment, salary

3. Upon leave of this court, plaintiff filed an amended complaint on September 17, 1987.



level, and promotion opportunities on the basis of her sex." Amended Complaint, paragraph II. Plaintiff argues that she would have been in the group of management employees expressly referred to in the Decree as entitled to back pay had not defendant, in an allegedly intentional effort to deprive her of the benefits of the Decree, demoted her to an ineligible position prior to the execution of the Decree. She thus claims to be in the narrow category of persons who were, by explicit terms of the Decree, to have



benefited directly from the back pay provision.

Initially, this court is confronted with the question of plaintiff's standing, as a non-signatory to the Decree, to bring this action to enforce the Decree.\4 For, assuming arguendo that plaintiff does belong to the narrow category of persons intended to benefit directly

4. I note that jurisdiction of plaintiff's complaint is based solely on the Decree. Plaintiff brings no individual claim of discrimination in this action; such claims appear to have been exhausted or resolved in other actions.



from the Decree, it is far from settled whether, in a case of this kind, a non-party beneficiary of a consent decree has standing to enforce the decree.

In a securities case, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), the Supreme Court observed that "a well-settled line of authority. . . establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it." Id. at 750 (citing, among other cases, United



States v. Armour & Co., 402 U.S. 673
(1971) (antitrust action)). The
rationale for this observation had
been expressed below in Judge
Hufstedler's dissent: Judge
Hufstedler pointed out that the
potential exposure to litigation by
allowing standing to nonparties would
seriously impair settlement of
litigation, an end that she found
outweighed the interest of nonparty
litigants in obtaining direct
vindication of private interests.

Blue Chip Stamps v. Manor Drug
Stores, 492 F.2d. 136, 144 n.3 (9th
Cir. 1974) (Hufstedler, J.



dissenting).

However, the courts of appeals are in disagreement as to whether the Blue Chip rule should apply to nonparty beneficiaries of consent decrees affecting civil rights. The Second Circuit has suggested that nonparty prisoners who would benefit from a stipulation settling an action of other prisoners might have standing to enforce the stipulation. Lasky v. Quinlan, 558 F.2d 1133, 1137 (2d Cir. 1977).\5 Two district

5. See also Owens v. Haas, 601 F. 2d 1242 (2d Cir. 1979) (finding prisoners had a cause of action as

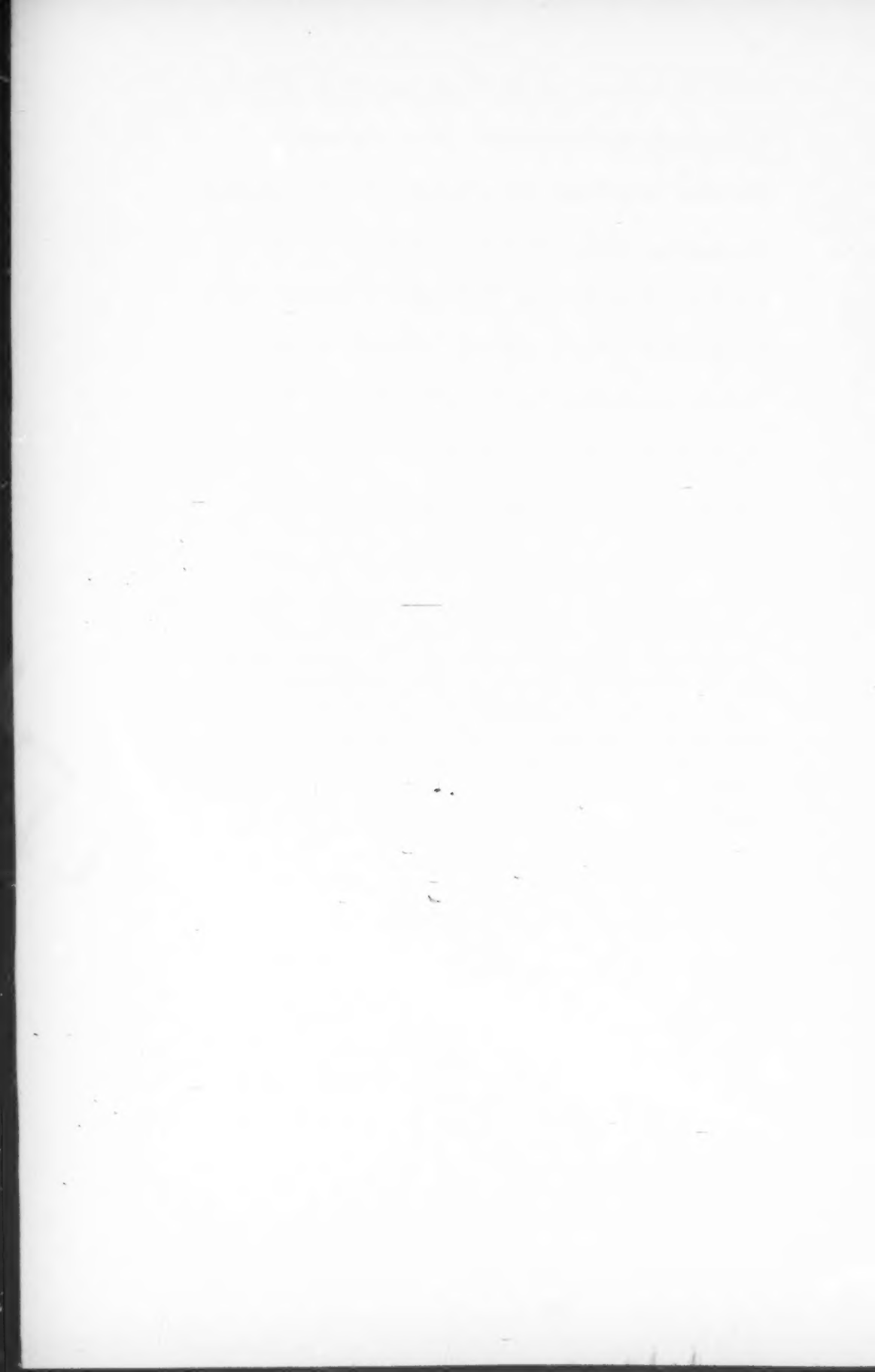
courts in the Second Circuit have allowed third party standing to enforce employment discrimination consent decrees. See Virgo v. Local Union, 107 F.R.D. 84, 91 (S.D.N.Y. 1985) (distinguishing civil rights cases from securities and antitrust cases for the purposes of third-party standing); Byrd v. Long Island Lighting Co., 565 F. Supp. 1455 (E.D.N.Y. 1983). The Seventh Circuit has also found that union members

[Footnote 5 continued]
third party beneficiaries of a contract affecting prison conditions).



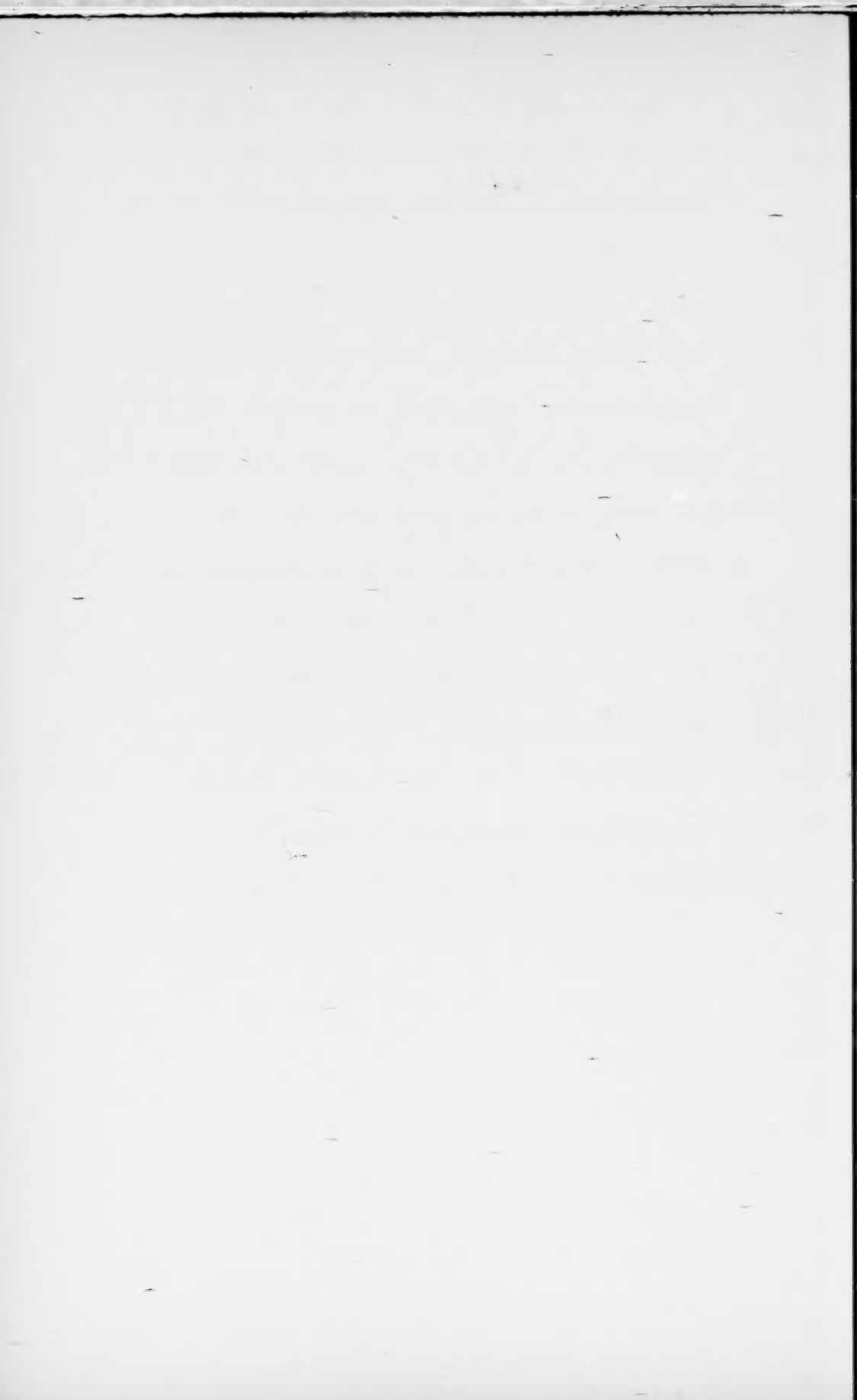
have a cause of action as the third party beneficiaries of a consent decree entered by their union, Jones v. Local 520, 603 F. 2d 664 (7th Cir. 1979), \6 and the Federal Circuit has extended third party standing to water purchasers to enforce a consent decree governing water allocation between the United States and the

6. Using a different remedy, the Seventh Circuit has also allowed nonparty beneficiaries to intervene in an action before the expiration of the court's jurisdiction over a consent decree. As the five-year period in the present case expired in 1979, that course of action is unavailable in this case.



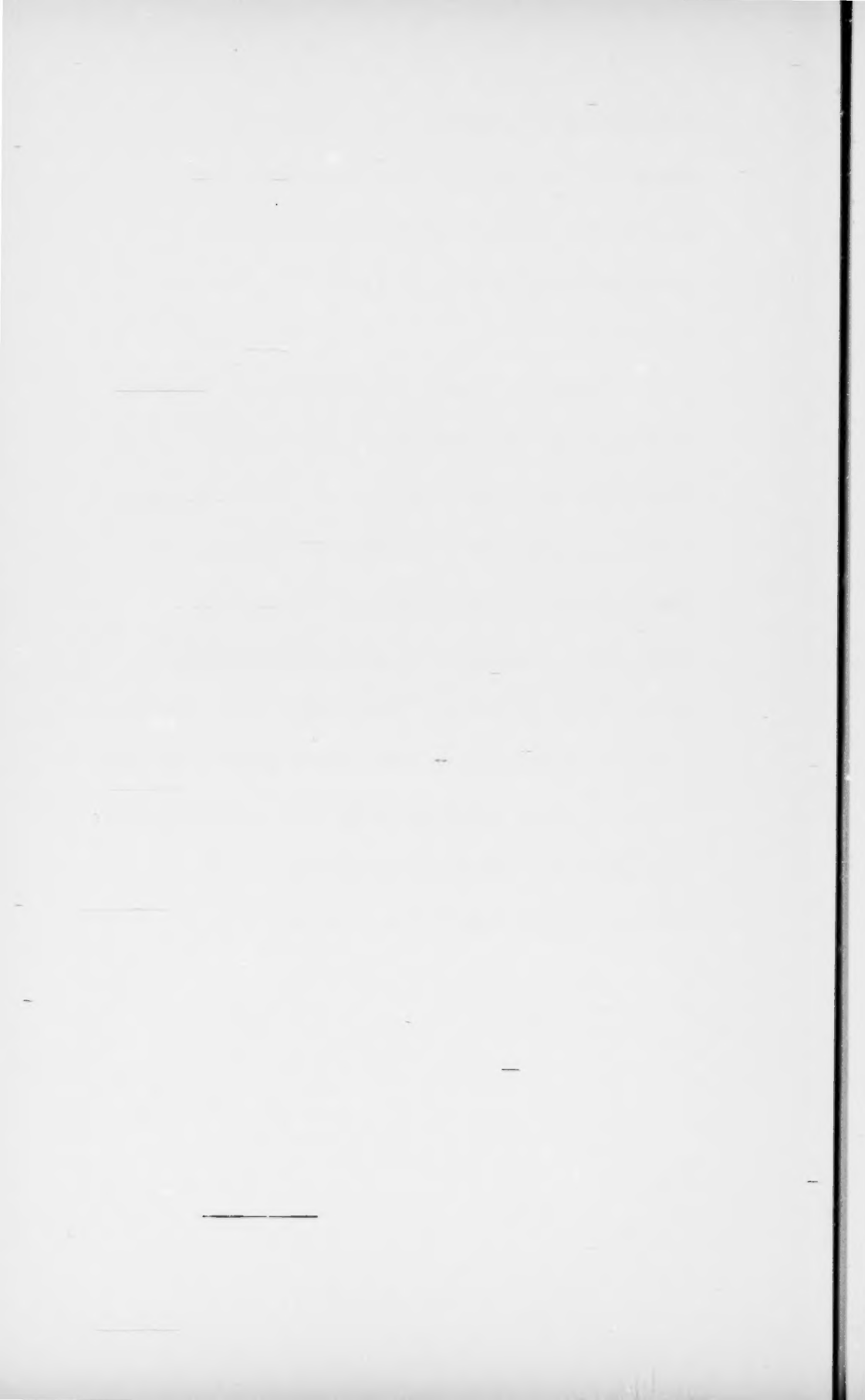
Bureau of Reclamation, H.F. Allen Orchards, v. United States, 749 F. 2d 1571 (Fed. Cir. 1984).

In contrast, district courts in the Third, Sixth, and Ninth Circuits have denied standing to plaintiff's seeking to enforce consent decrees entered in cases brought by the EEOC. See Wilson v. Bell Telephone Co., Civ. No. 75-441 (E.D. Pa. Jan. 10, 1978); Mullins v. South Central Bell Telephone Co., Civ. No. 1-77-127 (E.D. Tenn. Feb. 20, 1979); Equal Employment Opportunity Comm'n v. Local Union No. 3, 416 F. Supp. 728, 732 (N.D. Ca. 1975) (Peckham, C.J.)

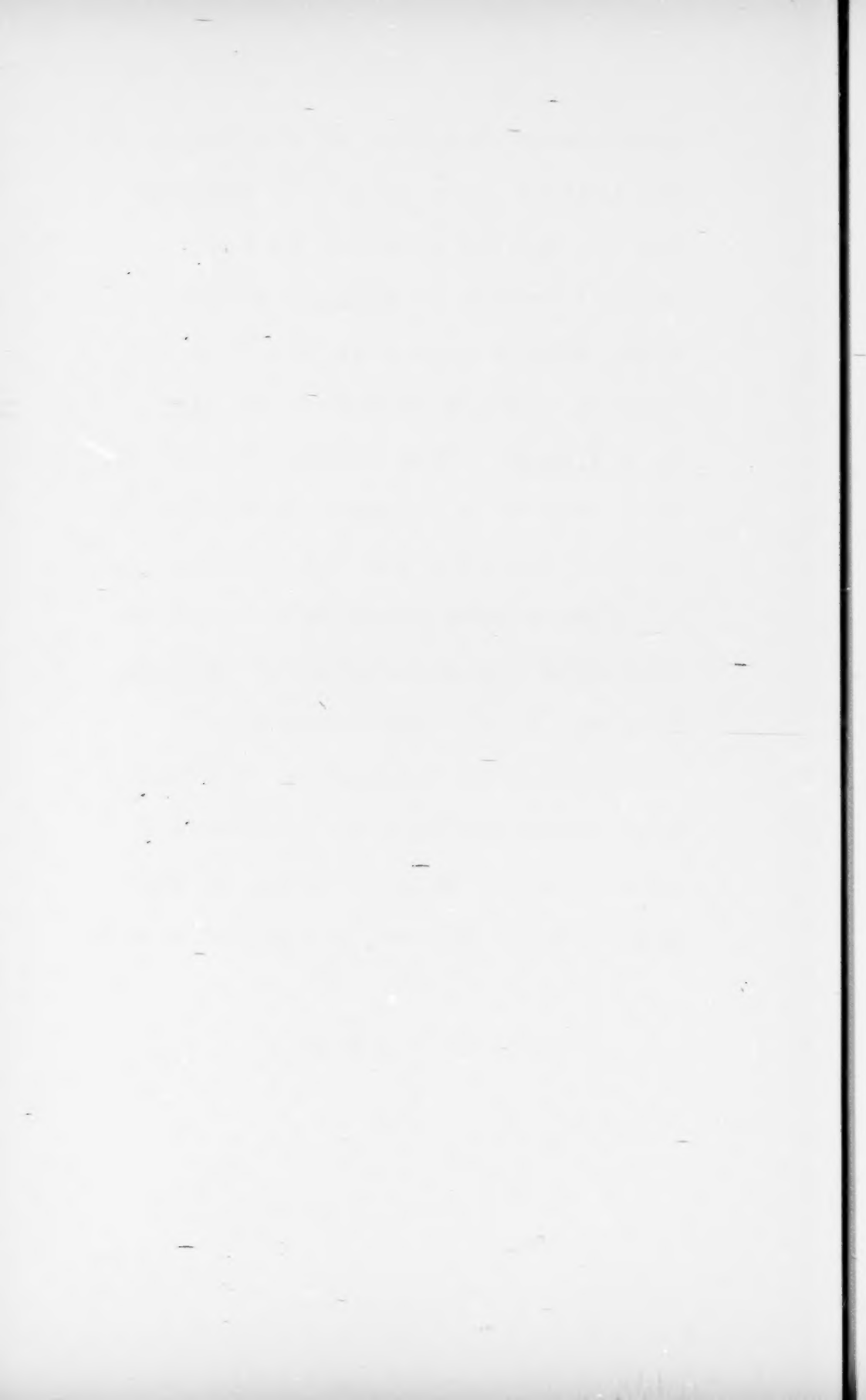


(denying standing to nonparty beneficiaries to the decree, but allowing their participation in proceedings as a friend of the court.)

The consent decree that formed the basis of the race and sex discrimination claims in both Wilson and Mullins was formed in Equal Employment Opportunity Comm'n v. American Telephone and Telegraph, Civ. 73-149 (E.D. Pa. Jan. 18, 1973), a case involving the same parties and issues, but addressing non-management employees. Significantly, this decree uses exactly the same

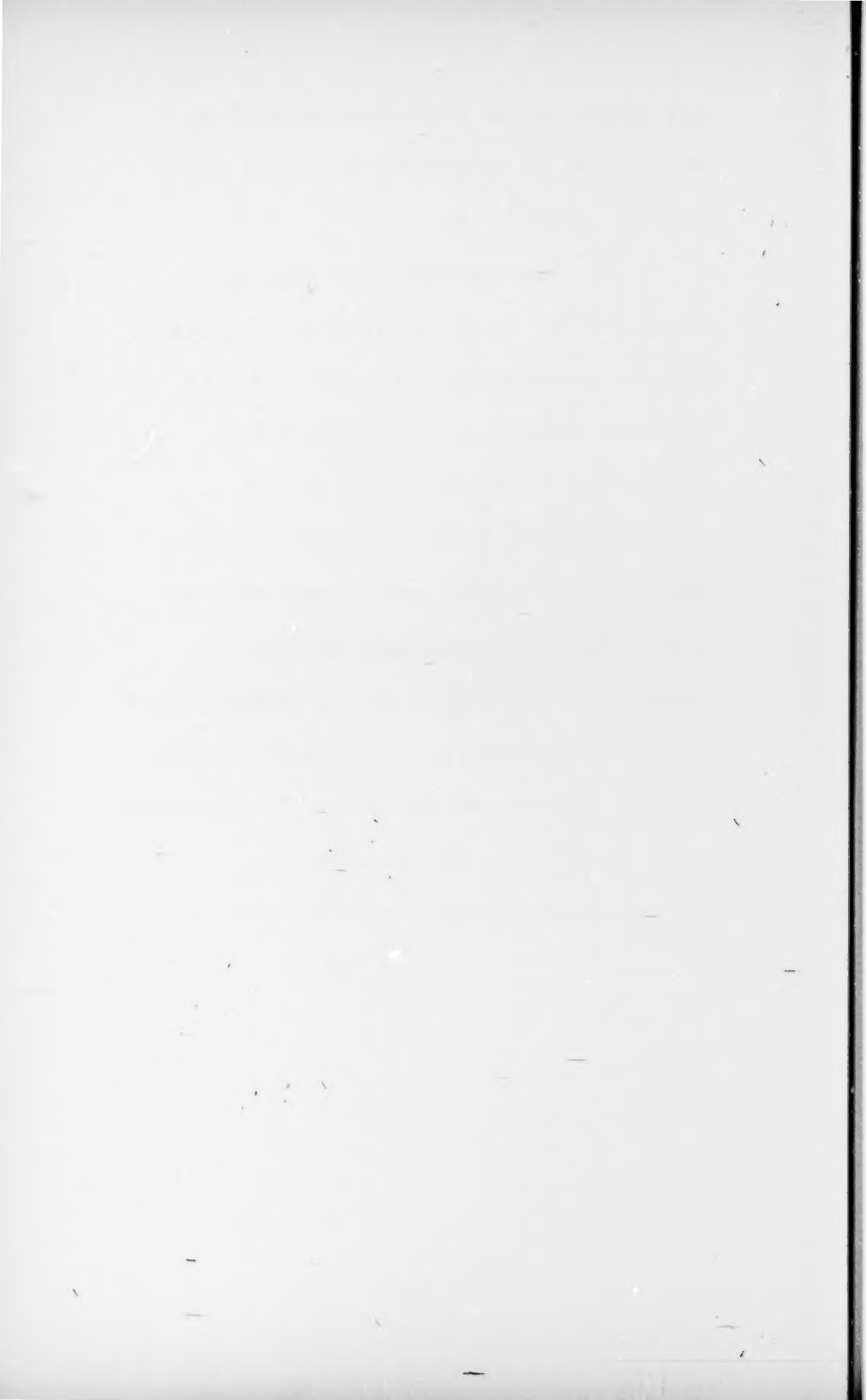


enforcement language as the Decree in the present case uses. In denying the claim made pursuant to the consent decree in Wilson, Judge VanArtsdalen drew directly from the Supreme Court's reasoning in Blue Chip Stamps: "[A] consent decree is more akin to a judgment order than a private contract and only parties to a judgment have standing to seek or challenge its enforcement." Wilson, slip op. at 4. The court thus concluded that "though it is clear Bell employees such as plaintiff's were intended beneficiaries of the AT&T consent decree, plaintiff's were

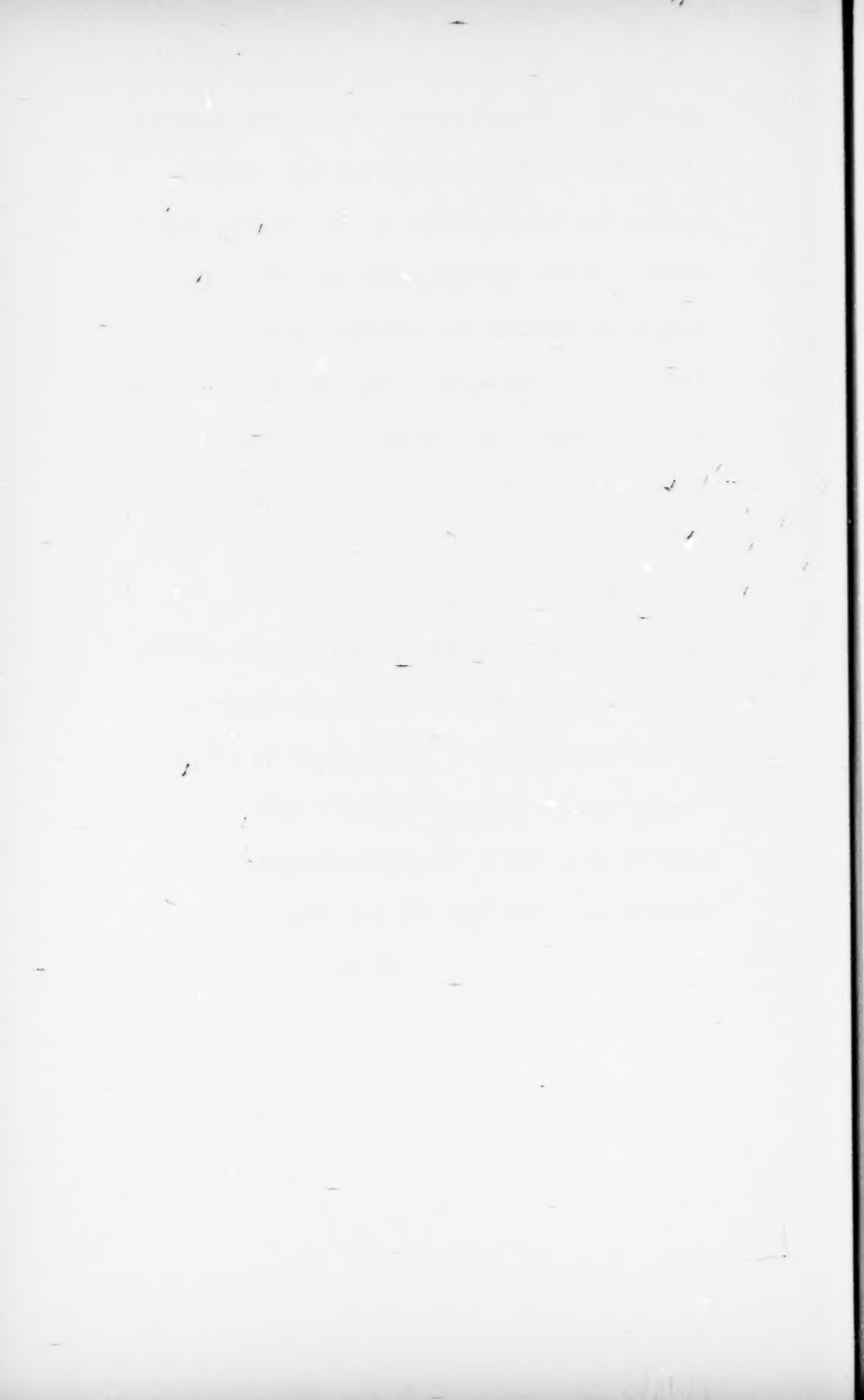


not parties to that decree and as such have no standing to seek its enforcement." Id.

To the extent that Wilson purports to find in Blue Chip Stamps a rule governing all civil rights consent decrees, I respectfully disagree. I think it is quite possible that some consent decrees, carefully parsed, would reflect an understanding that non-party beneficiaries could bring enforcement actions. However, the construction of the Decree at issue in the present case does not, in my view, contemplate enforcement by non-

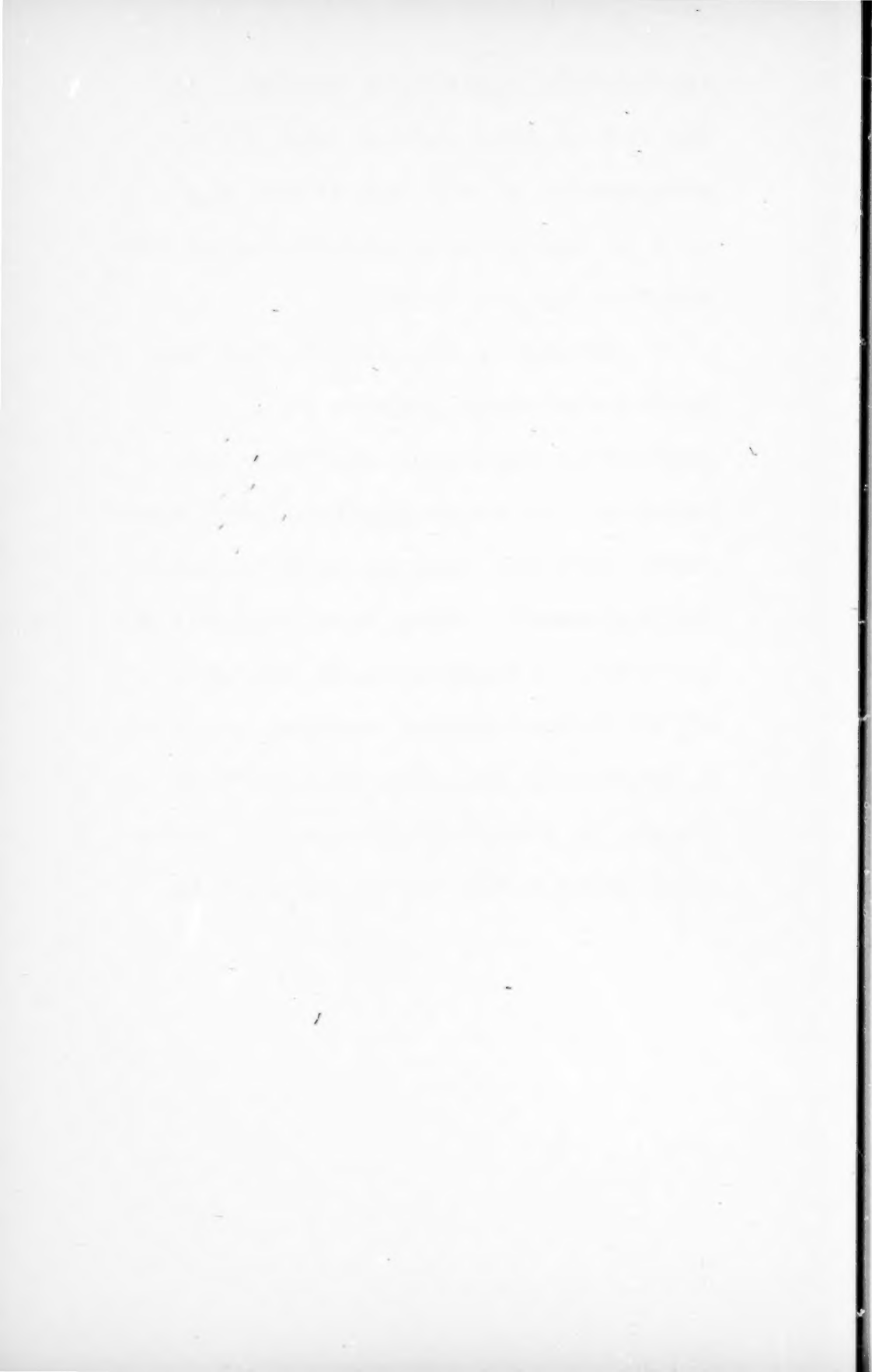


parties. Compliance with the Decree is addressed in Section II, which opens in subsection A. by reciting that "[t]he government plaintiffs shall endeavor to coordinate their efforts to assure compliance with the Decree" and concludes in subsection C that "[t]he government will promptly notify the Bell Company involved and A.T. & T. of any problems of noncompliance with this Decree which they believe warrant investigation. Such company will be given 60 days to investigate the complaint and conciliate with the government regarding the taking of any



appropriate corrective action. At the end of this period, the government, if not satisfied, may seek an appropriate resolution of the question by the Court."

Moreover, the extent that the Decree envisaged pursuit by individual employees of their own remedies, it seems apparent that such cases were not seen as arising under the Agreement. Thus Section I.B.I.B. provides: "Acceptance by any person of individual relief ordered inn Part A [promotion and back pay remedies sought by plaintiff Cicirello] shall constitute a waiver and release by



such person of any claims for alleged violations of Title VII of the Civil Rights Act of 1964, . . . Executive Order 11246, . . . or any applicable state fair employment practice laws or regulations based upon occurrences prior to the date of this Decree as respects [sic] those issues dealt with in the Decree." The Decree evidently contemplated separate litigation of private causes of action by plaintiffs who did not, whether because of ineligibility, error by the parties in enforcement, actual fraudulent exclusion, or other



reason, directly benefit from its provisions.

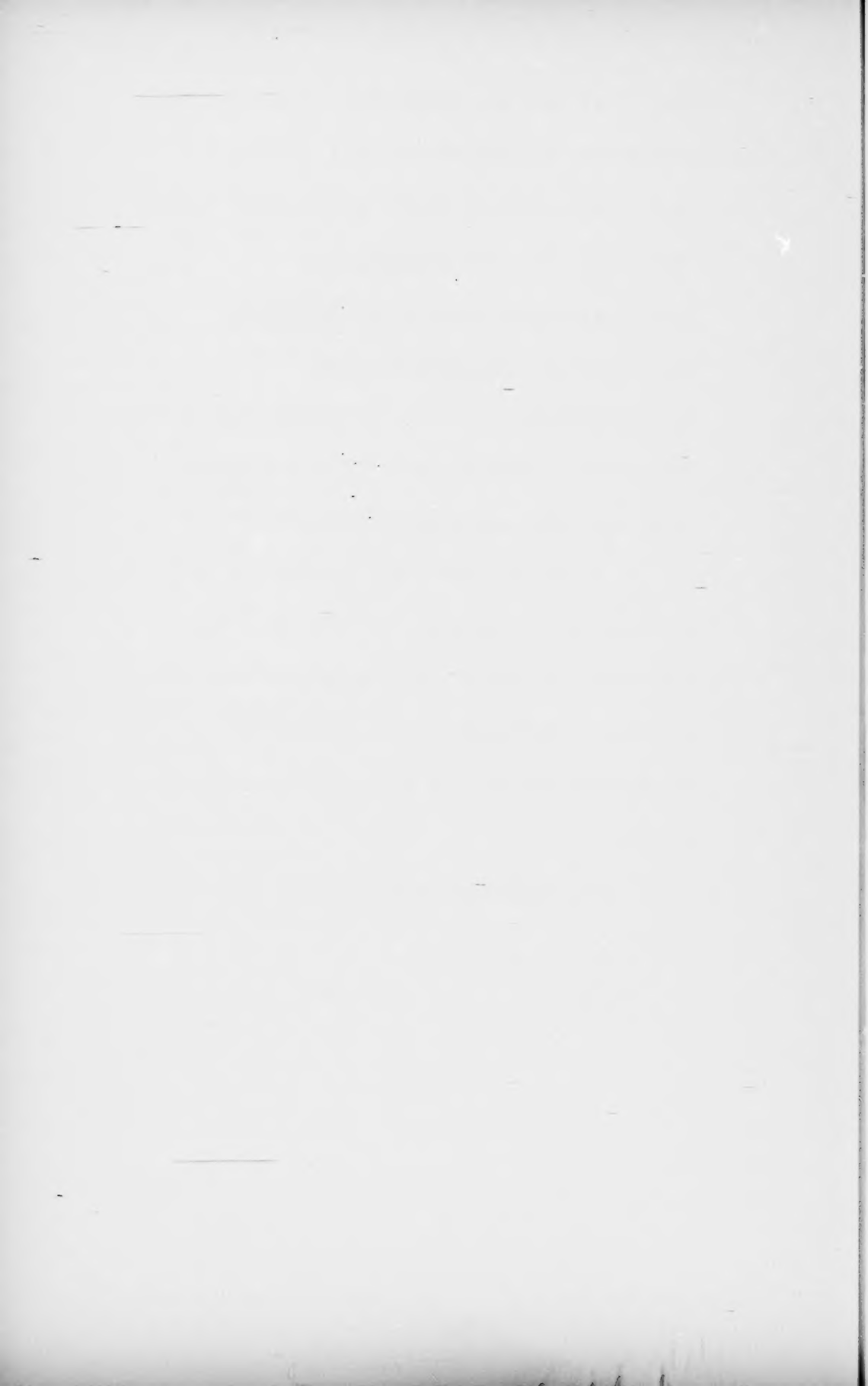
Other courts have had occasion to construe similar enforcement clauses allowing the "plaintiff United States " to apply for court enforcement of noncompliance. In Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, the court read this phrase as "plain language of the consent decree vest[ing] the right to bring an action for noncompliance exclusively in the United States. 423 F. Supp. 373, 381 (E.D. Mo. 1976) (emphasis added), aff'd, 568 F. 2d



558, 565 n. 10 (8th Cir. 1977) ("we perceive no error in the district court's holding that plaintiff lacks standing."). In Hameed v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, 637 F. 2d 506, 518 n. 10 (8th Cir. 1980), the Tenth Circuit came to the same conclusion.

I find that the closely analogous language of the Decree entered in this case yields the same result: plaintiff is without standing to bring this enforcement action.

An appropriate order follows.



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

ADELINA CICIRELLO:

v.

NEW YORK
TELEPHONE CO.

:
:
:
:
:

CIVIL NO.

86-3366

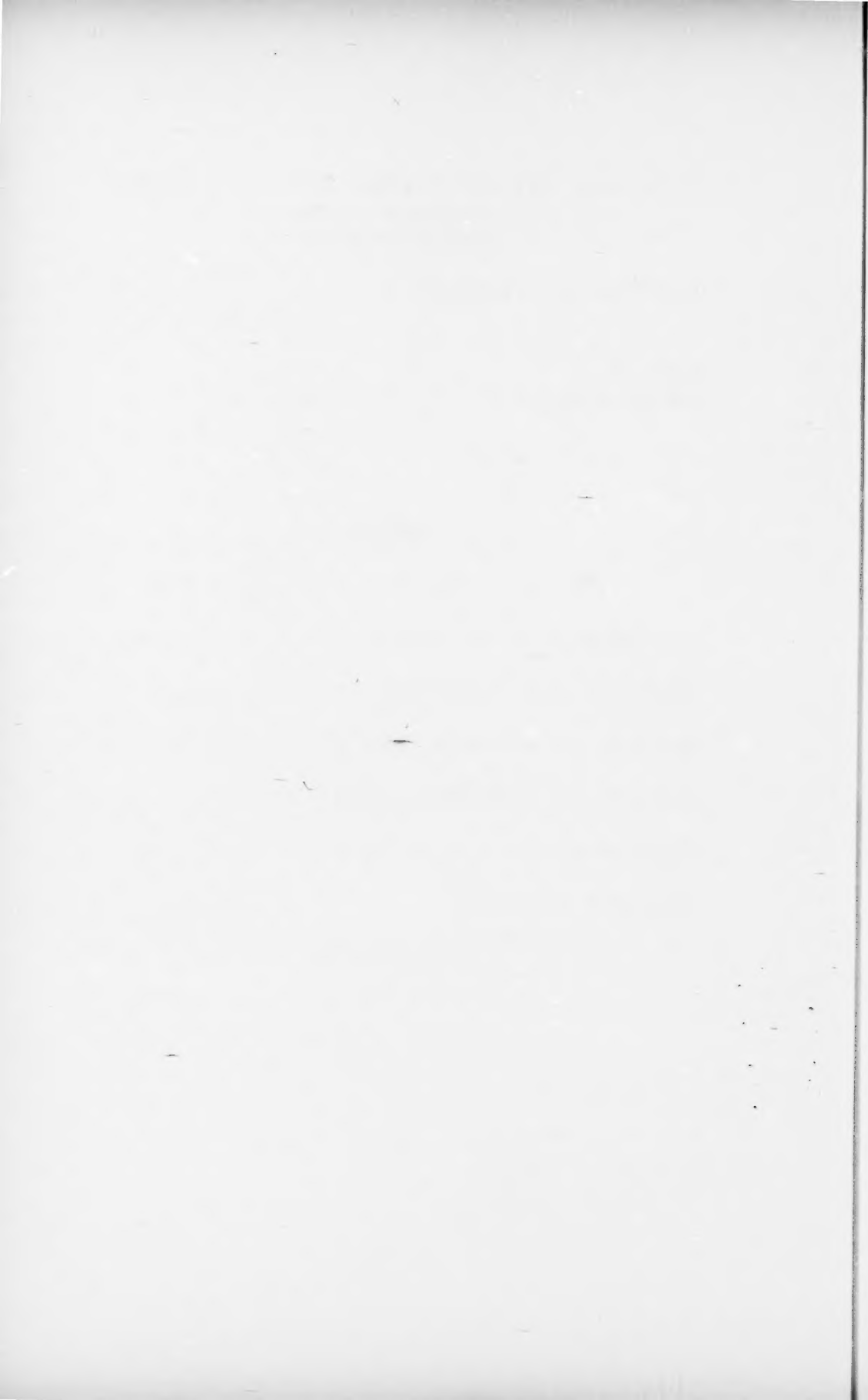
ORDER

For the reasons stated in the
accompanying memorandum, it is hereby
ORDERED and DIRECTED that defendant's
motion to dismiss the plaintiff's
action is GRANTED. This action is
dismissed in its entirety.

JANUARY 4, 1989

POLLACK, J.

A-26

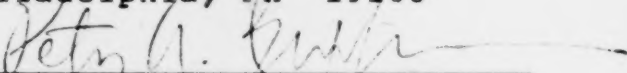


AFFIDAVIT OF SERVICE

Peter A. Buxbaum, attorney for
Petitioner, being duly sworn
according to law, hereby deposes and
says:

On August 25, 1989, three (3)
copies of the foregoing Petition for
Writ of Certiorari were served upon
the following by United States mail
first class, postage pre-paid:

Mark Dichter, Esquire
Morgan, Lewis and Bockius
2000 One Logan Square
Philadelphia, PA 19103



Peter A. Buxbaum
Attorney for Petitioner



Sworn and ascribed to me
this 7th day of August, 1989

Marilyn Freedman
Notary Public
MARALYN FREEDMAN
Notary Public, Phila., Phila. Co.
My Commission Expires Dec. 3, 1991